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Supreme Court, U. S.
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In the Supreme Court of the United States

No. A-589

ANTHONY ACAVINO, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS FOR REVIEW OF THE JUDGMENT ORDER OF DECEMBER 13, 1979 AFFIRMING THE JUDGMENT OF CONVICTION AND SENTENCE OF FEBRUARY 7, 1979 IN THE UNITED STATES DISTRICT COURT.

PETITION FOR WRIT OF CERTIORARI

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DISCUSSION OF LOWER COURT'S OPINIONS

Petitioner seeks review by Writ of Certiorari of the Judgment Order in the Third Circuit Court of Appeals entered December 13, 1979, and affirming the Judgment of Conviction and Sentence of two years imprisonment imposed by Honorable Louis C. Bechtle on February 6, 1979, on the indictment docketed 78-313-1 charging in a one count indictment four defendants, including the Petitioner, with conspiracy to bribe a Federal agent in violation of 18 U.S.C.A. §201 and §371. The jury in the trial before Judge Bechtle returned its guilty verdict on February 6, 1979, whereupon defense counsel in open court orally asserted post trial motions the following morning raising essentially three exceptions to the verdict, as follows:

(a) insufficient evidence to prove conspiracy, as a result of improperly admitted hearsay declarations of co-conspirators, fatal variance between the limits of the conspiracy pleaded in the indictment and impossibility of performing the alleged conspiracy or at least the existence of conditions beyond any defendant's control which were necessary for successful completion of the criminal acts.

(b) Prejudicial evidence of other crimes.

(c) Expression of opinion by the government attorney.

When Judge Bechtle then denied those motions and imposed sentence at that same proceeding, the Petitioner's counsel filed a timely Notice of Appeal in the Third Circuit. Appellate counsel raised essentially the same three issues as posed in the motion for new trial although the argument in Appellant's brief technically contained five exceptions to the verdict, and the Judgment Order of the Circuit Court affirming the

conviction expressly recognized and rejected five distinct arguments proposed by the Petitioner. In any case, the first three arguments in the Appellant's brief and the Judgment Order of December 13, 1979 issued by a panel containing Aldisert, Van Dusen, and Hunter, Circuit Judges, are different aspects of the single fundamental error which Petitioner contends resulted from the Court's improper interpreting and applying the evidentiary rules respecting hearsay, both as to admissibility of declarations by co-conspirators, failure to charge as to the requisite elements of the conspiracy offense, and denial of ACAVINO's motion for new trial based upon insufficient evidence of the Petitioner's guilt.

JURISDICTIONAL STATEMENT

The Petitioner seeks review by this Court of the Judgment Order of the Third Circuit Court of Appeals dated December 13, 1979, (reproduced infra.) affirming the Judgment of Conviction and Sentence imposed on the defendant in the United States District Court for the Eastern District of Pennsylvania on February 7, 1979. The initial Judgment of Conviction arose from a one count indictment, Criminal No. 78-313-1, in the Eastern District of Pennsylvania, charging the defendant with violation of the Federal Criminal Statute proscribing conspiring to bribe a federal law enforcement officer [in violation of 18 U.S.C.A. §201 and §371].

After denial of post trial motions by the Court by oral opinion delivered when the motions were made in open

Court on February 7, 1979. The timely appeal was docketed in the Third Circuit Court of Appeals at 79-1322.

It should be noted that the Petitioner filed with the Court certified copies of the Third Circuit docket entries at the time of the filing of a Motion to Extend the Time In Which To File The Petition For Certiorari which was submitted and disposed of before Justice Brennan. A copy of the Appendix to the Brief of the Appellant filed in the Third Circuit Court of Appeals is submitted for filing with the forty copies of this Petition for Certiorari in order to supply the District Court pleadings for this Court's perusal.

The Supreme Court's appellate jurisdiction in this matter rests upon 28 U.S.C.A.

§1254 which reads in pertinent part:

> §1254. Courts of Appeals; certiorari; appeal; certified questions
>
> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
> (1) By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree...,

STATEMENT OF ISSUES PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE NUMEROUS HEARSAY STATEMENTS MADE BY PERSONS PURPORTING TO BE CO-CONSPIRATORS OF THE DEFENDANT SINCE THE STATEMENTS WERE NOT MADE IN FURTHERANCE OF THE CONSPIRACY.

II. WHETHER IT WAS ERROR FOR THE TRIAL COURT TO SUBMIT TO THE JURY A CONSPIRACY INDICTMENT WITH A FATALLY PREJUDICIAL VARIANCE IN THAT THERE WAS EVIDENCE OF SEVERAL CONSPIRACIES RATHER THAN THE SINGLE CONSPIRACY SET OUT IN THE INDICTMENT.

III. WHETHER THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE VERDICT BECAUSE THE PURPORTED OFFER TO BRIBE A DRUG ENFORCEMENT OFFICER WAS CONDITIONAL UPON EVENTS OUTSIDE THE CONTROL OF THE OFFICER OR THE DEFENDANT.

IV. WHETHER THE TRIAL COURT ERRED IN ADMITTING UNFAIRLY PREJUDICIAL EVIDENCE OF OTHER CRIMES COMMITTED BY THE DEFENDANT.

V. WHETHER IT WAS PREJUDICIAL ERROR FOR THE ATTORNEY FOR THE GOVERNMENT TO EXPRESS AN OPINION CONCERNING THE EVIDENCE AND WHETHER SUCH ERROR WAS COMPOUNDED BY THE REFUSAL OF THE COURT TO GIVE CORRECTIVE INSTRUCTIONS.

SUMMARY OF THE FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS AT ISSUE IN THIS PROCEEDING

Essentially the prime source of authority which Petitioner asserts in support of his claim of error in the trial is the Sixth Amendment to the United States Constitution. More particularly, the Sixth Amendment guarantee of the right to confront accusatory evidence has been abridged in Petitioner's case as a result of his convictions being based substantially upon evidence in the form of extrajudicial hearsay declarations of his alleged co-conspirators.

The requirement which is imposed by the confrontation clause in respect to determining the admissibility of such hearsay declarations is systematically set forth in the provisions of Federal Rule of Evidence §801(d)(2)(E).

This section provides for the requirement that prior to the admission of hearsay declarations, there need be independently proved the membership in the conspiracy of the defendant against whom the hearsay declaration is sought for admission as well as proof of the statement in question having been uttered in furtherance of the conspiracy's objective.

The Petition asserts as additional basis for review of the Third Circuit's Judgment Order of December 13, 1979, the unfair and prejudicial decision by the Trial Court to admit for consideration by the factfinder the evidence of other crimes committed by the defendant under the exception as recited in Rule 404(b) which section codifies the traditional exception for admissibility of other crimes when probative of plan, scheme, design, etc.

Final argument in support of the Petition arises from the comments of the prosecutor during closing argument in which he expressed personal opinions as to the guilt of the defendant. The essential authority cited for this proposition is codified in the provisions of Section 5.8(b) of the ABA Standards for the prosecution which has in turn been adopted as authority in decisions of several Circuits. It is respectfully submitted, however, that the standard of proper deportment and ethics that is recited in this section of the ABA treatise ultimately rests upon the Constitutional provision for supervision of the conduct of the Courts and the officers thereof which is yet another issue of Constitutional origin and magnitude.

STATEMENT OF CASE

The Petitioner was indicted on October 25, 1978, along with three other persons. He was charged with conspiring with them to offer a thing of value to a public official to induce such public official to do acts in violation of his public duty, in violation of 18 U.S.C. 201. The Petitioner pleaded not guilty and was tried separately from co-defendants by a jury presided over by the Honorable Louis C. Bechtle. The jury returned a verdict of guilty. Post-trial motions were argued at the bar of the Court and orally, per Bechtle, J., were denied. Also, on February 7, 1979, the defendant was sentenced to two years of imprisonment. Notice of appeal was filed on February 13, 1979.

The factual history relevant to the charges in the indictment begins with

Mr. Leonard Meadows, an informant in the employ of the Drug Enforcement Administration ("DEA"). On June 27, 1978, he received a phone call from someone subsequently identified as the Petitioner, who indicated that on June 17, 1978, agents of the DEA had raided a house of some friends of his, and asked whether or not anything could be done to help his friends. Meadows responded that he would contact the agent on the case and make inquiries. On the next day the Petitioner called again and told Meadows he wished to give information to and cooperate with the DEA. There was then a face-to-face meeting at which the Petitioner indicated that he was not involved in the raid but was disinterestedly seeking to cooperate in order to help his friends. Contact was made with Agent Kean of the DEA, who indicated a

willingness to "work something out" for these friends in return for cooperation.

As the result of these conversations, Agent Kean arranged a meeting between himself, the defendant, and the defendant's friends, which took place on July 31, 1978. Kean met the Petitioner first, who told him that he was not "involved" in anything, "had nothing to do with it" and that the Agent would have to speak to other persons who were at that moment on their way to the meeting. When the others, Aufierio, Gangemi, and Sanatasi arrived, the Agent instructed the Petitioner to leave the area. With the defendant gone, Aufierio offered the Agent $20,000 to fix a narcotics case (3rd Circ. Appendix p. 21).

Meadows testified that on August 2, 1978, conversations were had between Meadows and the Petitioner about a Robert

Mucci meeting with Agent Kean to discuss Kean's possible help in securing the release of a Mr. Bailey in return for certain monies paid to Kean by Mucci. In a taped conversation purportedly between Meadows and the Petitioner on September 13, 1978, the person identified as the Petitioner by Meadows discussed the possibility that certain of his friends would provide money for certain action by Kean in connection with Bailey. However, the discussion was very nebulous and hypotehtical because such action would be required of Kean only if and when Bailey's appeal was approved. In the words of the person whose voice was purported to be that of the defendant: "That, that gets turned down, there's no chance, they can't do nothing." (Page 2, Government's Exhibit 2' transcript of tape on September 13, 1978;

Appendix p. 28). Meadows testified that several days prior to that conversation, the Petitioner had indicated that the payment for such cooperation, should it be needed, would be $50,000.

Meadows testified that shortly after he met Mucci for the first time at Petitioner's garage. After ACAVINO walked far enough away to be out of earshot, Mucci and Meadows had a conversation in which Mucci told Meadows that he would pay Kean for his help in seeking the release of his "partner," Bailey. Meadows testified that the defendant took no part in this conversation (Appendix p. 11 et seq.)

On September 19, 1978, Meadows called the Petitioner on the telephone. During the conversation, Meadows and the person whose voice was purported to be the Petitioner's arranged for a meeting on the following day between Agent Kean, Mucci, the Petitioner, and Meadows. (Government's Exhibit No. 4; transcript of tape of September 19, 1978; Appendix 29). On the following day Meadows met Mucci at a prearranged location. Petitioner was not present. Meadows took Mucci to meet Agent Kean near the Federal Building. In a conversation with Agent Kean, Mucci again offered Kean money to help Bailey. (Appendix 22).

On September 29, 1978, Meadows went to Aufierio's house where he met Aufierio, Gangemi, Mucci and the Petitioner. He testified that Aufierio and the defendant placed $5,000 on a table and asked him to take the money to Agent Kean. He declined, indicating that the money had to go directly to Kean. As Meadows was leaving, Aufierio made him a present of

a sweater and a hair dryer. After Meadows had driven away in his automobile, his female companion discovered $5,000 in the sweater.

In another taped conversation, dated October 2, 1978, Meadows informed a person purporting to be the Petitioner that Kean said that the $5,000 tendered was insufficient. The listener replied that he was not involved, that he had simply made an appointment for Mucci, and that he was "out of it." He said: "I'm done with them after this. This last thing, I'm done, getting my end and I quit." (Government Exhibit 7; transcript of tape on October 2, 1978; page 2; Appendix 32). The voice said that Meadows and Kean would have to look to Mucci for money ... "Because I ain't got nothing to do with this. I'm just putting out a few bucks for these

people I ain't doing nothing with these, you know." (Id., p. 7; Appendix 33).

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE NUMEROUS HEARSAY STATEMENTS MADE BY PERSONS PURPORTING TO BE CO-CONSPIRATORS OF THE PETITIONER BECAUSE THE STATEMENTS WERE NOT MADE IN FURTHERANCE OF THE CONSPIRACY.

Federal Rule of Evidence 801(d)(2)(E) provides in pertinent part, that "A statement is not hearsay if ... The statement is offered against a party and is ... a statement of a party during the course of and in furtherance of the conspiracy." The inclusion of the "in furtherance" requirement ... "was motivated by a desire to strike a balance between the great need for conspirators' statements in combatting undesirable criminal activity which is inherently secretive and difficult of proof and the need to protect the accused against idle chatter of criminal partners as well as inadvertently misreported and deliberately fabri-

cated evidence." IV Weinstein's Evidence, Sec. 801(d)(2)(E)[01], p. 801-146.

The Courts have interpreted the "in furtherance" requirement as being protective of defendants and a shield against the admission of unreliable evidence. Casual admissions of culpability which in no way further the conspiracy or assist in achieving the conspirators' objectives are inadmissible. United States v. Moore, 522 F.2d 1068, 1077 (9th Cir. 1975), cert.denied, 423 U.S. 1049 (1976). Gratuitous narrative declarations which do no more than place a defendant at a meeting, United States v. DiRodio, 565 F.2d 573 (9th Cir. 1977), or declare the defendant to be a participant in a criminal enterprise, United States v. Birnbaum, 337 F.2d 490, 494-495 (2nd Cir. 1964),

are not "in furtherance" of conspiratorial goals. The statement must be made by the declarant in advancement of the alleged partnership in crime, and not a goal which is a "frolic of his own." United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976).

Instantly the Government introduced a great volume of hearsay evidence supposedly under the co-conspirator exception without such evidence satisfying the "in furtherance" requirement. In the seven taped conversations introduced by the Government there are extensive declarations by the undercover agent, Meadows. These statements are, by definition, not "in furtherance" of the conspiracy because Meadows, of course, was not a co-conspirator but involved in investigation of criminal activities. The agency theory, which holds that a person who joins with others in a joint criminal enterprise should be chargeable with what those others say does not apply at all.

The admission of such testimony gives the Government an unusual opportunity to present to the jury, through its spokesman, a preconceived and structured counterpoint to what that spokesman considers most incriminating in the accused's conversation. He can lead the accused on to make incriminating remarks and reinforce those remarks by agreement and amplification. Mr. Meadows, obviously an experienced practitioner of this art, did not miss his opportunity. The following are just a few examples from the tapes:

> "Do you say there's something that I can make, to make some money?" (Government's Exhibit 1, p. 2, Appendix 26).

> "Now would they be willing to front any money?" (Government's Exhibit 2, p. 2; Appendix 27).
>
> "Well, how much money do you think they would be, if he be willing, if I can somehow persuade him to go along with it. How much do you think they would put up front?" (Government's Exhibit 2, p. 3; Appendix 28).

The tapes are replete with obvious attempts by Meadows, and in one tapem Kean, to draw the Petitioner out and by leading questions to have him say things in a way most beneficial to the Government's case. This cannot be justified by the co-conspirator exception or by any other rule of law. These declarations were not made "in furtherance" of conspiratorial goals and were hence impermissible hearsay.

The government also introduced tapes of conversations between Meadows and Thomas Aufierio, an alleged co-conspirator.

These conversations were also objectionable because of extensive reference to subjects which were not listed in the indictment as objects of the conspiracy, to wit, Aufierio's future plans for drug operations. (Government's Exhibit 5, p.4; Government's Exhibit 6, p.4; Appendix 30 and 31). The indictment stated that the object was to bribe Agent Kean to take favorable action on his investigation of the conspirators' drug trafficking. It did <u>not</u> charge any drug offense. Hence any statements by Aufierio about his future drug operations were not "in furtherance" of the stated goals of the conspiracy. Furthermore, the only favorable action requested in connection with Agent Kean's investigation was as to the raid which occurred on September 17, 1978. Specifically, the conspirators allegedly

sought identification of the informant responsible for the raid. There was no attempt to have Agent Kean protect future operations. The statements made by Aufierio were wholly outside the scope of the conspiracy and constituted a "frolic of his own." See United States v. Kessler, supra.

II. IT WAS ERROR FOR THE TRIAL COURT TO SUBMIT TO THE JURY A CONSPIRACY INDICTMENT WITH A FATALLY PREJUDICIAL VARIANCE IN THAT THERE WAS EVIDENCE OF SEVERAL CONSPIRACIES RATHER THAN THE SINGLE CONSPIRACY SET OUT IN THE INDICTMENT.

When a conviction is obtained on the theory that all defendants are members of a single, all inclusive conspiracy although the proof at trial shows multiple conspiracies, there is a fatal variance between the indictment and the evidence, and if prejudicial to the accused, error is committed requiring a new trial. Berger v. U.S., 295 U.S. 78 (1935); Kotteakos v. United States, 328 U.S. 750 (1946).

> The necessity for distinguishing between evidence which tends to show a single overall conspiracy and that which tends to show several separate conspiracies...derives from our interest, clearly our duty, in jealously protecting those accused from the possible transference of guilty of others accused, at least in

> the eyes and minds of a jury, which so often is claimed to be encountered where en masse prosecutions are undertaken for a conglomeration of separate offenses. United States v. Perez, 489 F.2d 51, 57 (3rd Cir. 1976), cert. denied, 417 U.S. 945.

The instant indictment lists one conspiracy with the following three objects:

> 1. It was an object of the conspiracy that the defendants and co-conspirators would offer $50,000 to Special Agent William B. Kean, III, of the Drug Enforcement Administration for him to provide information or testimony that would enable a convicted felon currently in the custody of the Attorney General, to wit, James Bailey, to obtain a new trial on appeal.
>
> 2. It was further an object of the conspiracy to induce Agent Kean to provide additional testimony at a second trial of James Bailey that would result in Bailey's acquittal.
>
> 3. It was further an object of the conspiracy to induce Agent Kean to obtain for the conspirators a favorable outcome of an investigation which the Drug Enforcement Administration was conducting into their illegal trafficking in methamphetamine.

Thus, the indictment concerns two entirely separate projects: (1) helping Bailey get out of prison, and (2) covering those persons involved in certain drug operations. The first approach of the defendant to Meadows involved helping those involved in the raid of September 17, 1978, by cooperation of the authorities. A meeting is arranged with Agent Kean. The Petitioner meets Kean and tells him he is not involved, but that the responsible parties are on the way. The Petitioner leaves and Aufierio and Gangemi arrive. They mention for the first time the offer to get Bailey out, much to Kean's surprise, as it was evident that the Petitioner was not involved with that project (Appendix 21).

Similarly, a meeting is arranged between Mucci and Meadows. Only after

the Petitioner moves out of hearing distance does Mucci inform Meadows that Bailey is his partner and that he had done Mucci a lot of favors. Despite the fact that the Petitioner conveyed information between Meadows on one hand and Aufierio and Mucci on the other, he does not appear to have been a participant in the attempt to secure Bailey's release. (Appendix 11-13). Indeed the extent of his connection seems to be providing certain monies to Mucci and Aufierio. "I ain't got nothing to do with this. I'm just putting out a few bucks for these people." (Government Exhibit 7; transcript of tape on October 2, 1978, p. 7; Appendix 33). Helping Bailey seems to have been solely the concern of Aufierio and Mucci. To lump this discreet conspiracy along with another, which involved seeking favor-

able action by Agent Kean in his investigation of drug trafficking, is prejudicial to the defendant in that it uses his association with Aufierio and Mucci to connect him with objectives which he did not share with them.

III. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE VERDICT BECAUSE THE PURPORTED OFFER TO BRIBE A DRUG ENFORCEMENT OFFICER WAS CONDITIONAL UPON EVENTS OUTSIDE THE CONTROL OF THE OFFICER OR THE PETITIONER.

The Government introduced a tape of a conversation between a person alleged to be the Petitioner and the informer, Meadows. In it, the person purporting to be the Petitioner explains what action is desired from Agent Kean in favor of a convict identified as James Bailey. It is made clear to Meadows that assistance will not be desired from Kean unless and until Bailey's appeal is approved:

ACAVINO	Just make any opening that a lawyer can get out on a technicality.
SD1-40028	Ah huh, is it...
ACAVINO	Any kind of an opening
SD1-40028	Ahuh
ACAVINO	If he can say well I'm, I'm not sure about something, any technicality. If we can make a deal, I know Bailey will go for it. But after this is all over.
SD1-40028	Ahuh. Yea, well I was talking him you know, cause I wanted to gat a hold of him being you know, he's not here That's why...
ACAVINO	We got to get the appeal approved first
SD1-40028	Ahuh
ACAVINO	As it is, they're not going to approve it unless we get help with it
ACAVINO	Tell him they got an appeal now, this is his last appeal before the Supreme Court
SD1-40028	Ahuh
ACAVINO	That, that gets turned down, there's no chance, they can't do nothing.

[Government's Exhibit 2; Transcript of tape of conversation on September 13, 1978, pp. 2-3; Appendix 27 and 28].

Conspiracy is a crime which requires specific intent. If the object of that

conspiracy is conditional or speculative the mental state of the conspirators can rise no higher than expectation or hope that, should circumstances change, their objects might be achieved. In such a case it cannot be said that the conspirators have a present intention to effectuate the goals of the criminal enterprise. Any money given or promised in such a situation cannot be said to be tendered with the intent of influencing an official's action, but can, at most be construed to gain his favor for future cooperation.

Although there is little law on this precise subject, some illumination is provided by the following:

> In some jurisdictions, it is required that the officer be influenced in respect of a specific matter coming within his official duties and then pending. Thus an offer made to a person in contemplation of a mere probability that he may be called to perform official functions, and intended to influence his conduct in performance of such functions if he shall be so called, does not violate a statute relating to bribery of persons performing an official function. [11 C.J.S. (Bribery) Sec. 2, p. 849.]

It cannot be said that such doctrine is illogical, particularly in a case like the instant one, where the offer is entirely conditional upon the occurrence of future events.

IV. THE TRIAL COURT ERRED IN ADMITTING UNFAIRLY PREJUDICIAL EVIDENCE OF OTHER CRIMES COMMITTED BY THE DEFENDANT.

Federal Rule of Evidence 404(b) states as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

Legislative history of the rule indicates that it countenances admission of "bad acts" evidence that is relevant to any issue in the case, "except to show the likelihood that, having once fallen into sin, a second slip is likely." United States v. James, 555 F.2d 992, 999 (1977). The proponent of such evidence must show that its probative values outweigh its prejudicial effect. United States v.

James, 555 F.2d 999, Bradley v. United States, 433 F.2d 1113 (D.C. 1969). This requirement is embodied in Fed.R.Evid. 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In deciding whether to admit such evidence the Court must carefully weigh both factors: probative value and prejudice.

> The exercise of discretion must be addressed to a balancing of the probative value of the proffered evidence, on the one hand, against its prejudicial character, on the other. The probative value is measured by the extent to which the evidence of prior criminal activities, other than a conviction, closely related in time and subject matter, tends to establish that the accused committed the criminal act charged in the indictment knowingly or with criminal

> intent or tends to negative the claim that the acts were committed innocently or through mistake or misunderstanding. [United States v. Byrd, 352 F.2d 570, 574 (1965)]

Moreover, in gauging the element of probative value, perhaps the most significant feature is the necessity for the evidence - whether in light of other evidence available to the government on that specific issue and the danger of undue prejudice, the "bad acts" evidence is necessary, McCormick on Evidence, 2nd Ed., Sec. 190; 1 Wharton's Criminal Evidence, Sec. 237.

The importance of properly balancing these factors cannot be minimized. Banning prejudicial evidence of other crimes is not merely a technical rule, but a principal which, while not necessarily rising to constitutional proportions, arises out of fundamental demand for justice and fairness. U.S. ex rel. Lowry

v. Myers, 364 F.2d 297 (3rd Cir. 1970); U.S. ex rel. Berkery v. Myers, 242 F. Supp. D.C. Pa. (1967). The Court's action may well decide the case in the government's favor, despite limiting instructions.

> It is generally recognized that there can be no complete assurance that the jury even under the best of instructions will strictly confine the use of this kind of evidence to the issue of knowledge and intent and wholly put out of their minds the implication that the accused, having committed the prior similar criminal acts probably committed the one with which he is actually charged. U.S. v. Byrd, 352 F.2d 574.

At the outset of this case, counsel brought to the Court's attention the intention of the Government to introduce evidence of illegal drug trafficking of the Petitioner to show his motive for seeking to bribe Agent Kean. Counsel indicated that he would object to the

introduction of such evidence and the Court indicated the objection would be overruled. Counsel then offered to stipulate that Petitioner was an object of an investigation involving narcotics. (Appendix 8). The Court replied that such a stipulation would be "grossly bland" and not sufficient for the Government's purposes, although he promises to restrain the Government from going into "raptures about accusations." (Appendix 9-10). It is submitted that the Government did go into "raptures" about drugs. There can be no question that the Government imported a second trial into this conspiracy matter - the case of Anthony Acavino, drug trafficker. His friends had been subjected to a drug raid. He offers to give someone a "pound" of drugs. He is involved in plans for manufacture of new drugs. His alleged co-

conspirators, Aufierio, Mucci, etc., constantly talk about drugs. The jury was subjected to a constant barrage of this evidence over the continuing objection of counsel.

Necessity, as mentioned above, is the key factor to be considered in the admission of this evidence. In light of counsel's offer to stipulate that Petitioner was, at the pertinent time, an object of an investigation for dealings with drugs, it is clear that the admission of the tremendous volume of evidence of this kind was wholly unnecessary. Counsel could very easily have placed a stipulation before the Court which would have informed the jury of Petitioner's activities in sufficient detail to make them cognizant of a possible motive in seeking to bribe Agent Kean. The Government was certainly

entitled to have some evidence before the jury on motive, but it was the duty of the Court to ensure that this evidence was as limited as possible under the circumstances. Its rejection of any stipulation as being too "bland" and its failure at any point to check the constant flow of insinuation was an abuse of discretion.

V. IT WAS PREJUDICIAL ERROR FOR THE ATTORNEY FOR THE GOVERNMENT TO EXPRESS AN OPINION CONCERNING THE EVIDENCE AND SUCH ERROR WAS COMPOUNDED BY THE REFUSAL OF THE TRIAL COURT TO GIVE CORRECTIVE INSTRUCTIONS.

The identity of persons whose voice is recorded on tape is, of course, a fact at issue which they jury must decide. For the prosecution to voice an opinion on who the persons on the tape are is clearly an invasion of the jury's function. The attorney for the Government, in introducing tape G-7, informed the jury that the tape was a conversation between the defendant and an informant. (Appendix 14-15). Counsel objected and moved for a mistrial. His suggestion for corrective instruction, to the effect that the statement should be completely disregarded, was not accepted, and the Court told the jury that they could consider the statement for the purpose of identification.

(Appendix 19). Counsel renewed his request for corrective instructions at the conclusion of the Court's final charge to the jury and was again refused. (Appendix 24-25).

"A United States attorney in a criminal case has ever greater responsibility than counsel for an individual client. For the purpose of the individual case, he represents the great authority of the United States and must exercise that responsibility with the circumspection and dignity the occasion calls for." United States v. Kravitz, 281 F.2d 581, 587 (3rd Cir., 1960). cert. denied, 364 U.S. 941 (1961). In furtherance of this high standard of conduct for United States attorneys, the Third Circuit Court of Appeals has adopted Standard 5.8(b) of the A.B.A. Prosecution Standards (United States v. LeFevre,

483 F.2d 477 (1973)). That standard declares:

> It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence of the guilt of the defendant.

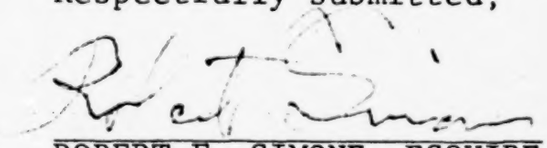
For the attorney for the Government to arrogate to himself the fact finding function reserved for the jury on a crucial element -- the identity of the voice of the defendant -- is clearly an improper expression of opinion. The representative of the Government is naturally regarded with great respect by the jury. For him to capitalize on his status by making unwarranted statements expressing his personal belief about facts at issue in the case is unprofessional conduct. While it has been held that an improper expression of opinion by the Government attorney concerning facts at issue can

be cured by proper corrective instructions, [See United States v. Bodey, 547 F.2d 1383 (9th Cir. 1977)] The Court twice refused to instruct the jury to completely disregard those remarks.

CONCLUSION

It is respectfully submitted for the foregoing reasons, that the Judgment Order of the Third Circuit Court be subject to review by this Court's Writ of Certiorari.

Respectfully submitted,



ROBERT F. SIMONE, ESQUIRE
Attorney for Petitioner

JUDGMENT ORDER OF THE THIRD CIRCUIT COURT OF APPEALS DECEMBER 13, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1322

UNITED STATES OF AMERICA

vs.

ACAVINO, ANTHONY,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 78-00313-01)

Submitted Under Third Circuit Rule 12(6)
December 13, 1979
Before: ALDISERT, VAN DUSEN and HUNTER, Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that (1) the court erred in admitting into evidence numerous hearsay statements made by persons purporting to be coconspirators of the appellant because the statements were not made in furtherance of the conspiracy, (2) it was error for the court to submit to the jury a conspiracy indictment with a fatal prejudicial variance in that there was evidence of several conspiracies rather than the single conspiracy set out in the indictment, (3) there was insufficient evidence to support the verdict because the purported offer to bribe a drug enforcement

JUDGMENT ORDER OF THE THIRD CIRCUIT COURT OF APPEALS DECEMBER 13, 1979

officer was conditional upon events outside the control of the officer or the appellant, (4) the court erred in admitting unfair prejudicial evidence of other crimes committed by the appellant, and (5) it was prejudicial error for the attorney for the government to express an opinion concerning the evidence and such error was compounded by the refusal of the court to give corrective instructions; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

Circuit Judge

Attest:
Thomas F. Quinn, Clerk
DATED: DEC 13 1979

CERTIFICATE OF SERVICE OF THE PETITION FOR CERTIORARI PURSUANT TO RULE 33 OF THE RULES OF THE UNITED STATES SUPREME COURT

ROBERT F. SIMONE, Esquire, being duly sworn according to law, deposes and says that he is counsel for the Petitioner, as well as a member of the Bar of the United States Supreme Court, and that copies of the attached Petition for Certiorari were served by depositing them in the United States mail, with first class postage, addressed as follows:

Thomas J. McBride, Esquire
Assistant U.S. Attorney
3310 U.S. Court House
601 Market Street
Philadelphia, Pa. 19106

Office of the Clerk
U.S. Court of Appeals
for the Third Circuit
21400 U. S. Court House
601 Market Street
Philadelphia, Pa. 19106

Honorable Louis C. Bechtle
U.S. District Court
2722 U.S. Court House
601 Market Street
Philadelphia, Pa. 19106

Honorable Wade H. McCree, Jr.
Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

ROBERT F. SIMONE
Counsel for Petitioner,
ANTHONY ACAVINO
Member, U.S. Supreme Court
Bar

DATE: 2/11/80

Form A. O. 247 (July 1958)

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

52

APPEAL FROM	CASE NO.
EASTERN DISTRICT OF PENNSYLVANIA	✓ 79-1322

TITLE OF CASE	ATTORNEYS FOR APPELLANT
UNITED STATES OF AMERICA vs. ACAVINO, ANTHONY, Appellant	Robert F. Simone
	ATTORNEYS FOR APPELLEE
	Thomas J. McBride

No. BELOW: D.C. Crim. No. 78-00313-01
JUDGE BELOW: Louis C. Bechtle
DATE OF JUDGMENT:
NOTICE OF APPEAL FILED: February 12, 1979
Commenced in D.C. October 25, 1978

DATE	ACCOUNT OF APPELLANT	Received	Disbursed	REMARKS
1979				
March 12	Clerk's fees	50 00		
3/29-31	[illegible]		52 -	

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CASE NO. 79-1322

DATE 1979	FILINGS—PROCEEDINGS	Filed
March 12	Copy of Notice of Appeal, received February 20, 1979, filed.	
	Record, received February 15, 1979, filed. (Paper No. 8 not included).	
	Order (Clerk) directing that if the transcript is desired and has not been filed, it shall be ordered forthwith, with the proper arrangements for payment to be made; directing the court reporter to file the transcript on or before April 11, 1979; directing appellant's brief and the appendix be filed and served within 30 days of the filing of the transcript in the DC, or within 30 days of the date of this order, whichever is later; directing appellee's brief be filed and served within 21 days after appellant's brief and the appendix are filed and served and directing the Clerk of the DC to deliver a copy of this order to the court reporter, filed.	
	Certified copy of above order to C of DC and Ct. Rep.	
Mar. 15	Appearance of Robert F. Simone, Esquire for appellant, filed.	
Aug. 2	Appearance of Thomas J. McBride, Esq. for appellee, filed.	
	Order (Clerk) directing that Robert F. Simone, Esquire, counsel for appellant, show cause in writing, original and three (3) copies, together with proof of service on all interested parties, on or beofre August 11, 1979, why the within appeal should not be dismissed for want of timely prosecution, and/or why said counsel for the appellant should not be subject to sanctions for his delay in the prosecution of this appeal. This order to show cause is made returnable before a panel of this Court which sits on September 4, 1979. Counsel will be advised if his physical presence will be required on the above return date or at any other date specified by the Court, filed.	
Aug. 10	Answer by Robert F. Simone, Esquire, counsel for appellant, to Order to Show Cause, filed. (4cc) Service attached.	
Aug. 21	Clerk's letter, written at the direction of the Court, to Robert F. Simone, Esq., counsel for appellant, directing that he is to appear on Tuesday, September 4, 1979 at 9:45 a.m., in the United States Court of Appeals courtroom in Phila., Pa. in regard to the Order to Show Cause; and requesting that he acknowledge receipt of this letter.	
Sept. 4	Brief for appellant, filed. (26cc) Service by hand on 9/4/79 attached.	
Sept. 4	Appendix, filed. (1lcc)	
Sept. 4	Heard on Order to Show Cause directed to Robert F. Simone, Esquire, counsel for appellant, why the within appeal should not be dismissed for want of timely prosecution, and/or why said counsel for appellant should not be subject to sanctions for his delay in the prosecution of this appeal. Coram: Aldisert and Garth, C.J.	
Sept. 7	Order (Aldisert and Garth, C.J.) discharging the order to show cause directed to Robert F. Simone, Esq., counsel for appellant; and directing Robert F. Simone, Esq., to pay a fine of $250.00 10 days from the date of this order, filed.	
Sept. 17	Receipt acknowledged of Mr. Simone's check in the amount of $250.00 in payment of the fine imposed by this Court in its order of September 7, 1979.	
Sept. 24	Motion by appellee for leave to extend time to file brief to October 9, 1979, filed. (4cc) Service attached.	
Sept. 25	Submitted on above motion. Clerk.	
Sept. 26	Order (Clerk) granting the above motion and directing that no further extensions will be granted, filed.	
Oct. 9	Brief for appellee, filed. (7cc) Service by mail on 10/9/79 attached.	
Nov. 30	Order (Aldisert, C.J.) directing that case be listed for disposition pursuant to Rule 12(6) without oral argument, filed.	
Dec. 13	Submitted on briefs. Coram: Aldisert, Van Dusen & Hunter, C.J.	

continued

Form A.O. 117a (July 1958)

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE CIRCUIT

CASE NO. 79-1322

PAGE TWO

DATE 1979	FILINGS—PROCEEDINGS	Filed
Dec. 13	Judgment Order (Aldisert, Van Dusen and Hunter, C.J.) affirming the judgment of the district court, filed.	